SEP 24 PAGE 29

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1979 TERM

NO. 78-6659

JOHNNY L. BLAKE,

Petitioner,

v.

VINSON F. THOMPSON,
Warden, and
TENNESSEE STATE PENITENTIARY,

~~Respondent.~~

Petr's Reply Brief

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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REPLY TO RESPONDENT'S ARGUMENT

FOR DENIAL OF CERTIORARI

Petitioner here replies to the arguments submitted by the Respondent for denial of his Petition for Certiorari.

I.

OPINION BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Western District of Tennessee, Western Division, on petitioner's Petition for Writ of Habeas Corpus, are unreported and appear attached to the petitioner's Petition for Writ of Certiorari at pages fifteen and twenty, respectively.

II.

JURISDICTION

The Order of the Court of Appeals was entered on February 9, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), and Rule 19 of the Rules of this Court.

III.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in the event that a state criminal defendant has been fully heard in the state trial court with respect to issues involving his federal rights, and has appealed the adverse decision of the trial court on the federal question to the state court of appeal, but has failed, under circumstances not amounting to a "deliberate by-pass" of state procedures, to assign the adverse decision of the state court of appeal on the federal question as error in his petition to the state supreme court for certiorari, such state criminal defendant has waived his federal claim for purposes of federal habeas corpus, so that his federal habeas petition must be denied even though there is no available state remedy remaining.

2. Whether this Court's holding in Jackson v. Virginia, 47 U.S.L.W. 4883, announced by this Court on June 28, 1979, while the instant Petition for Certiorari was pending, applies in the instant case.

In his original Petition before this Court, at page 2, petitioner described the second "Question Presented for Review" as follows:

> "Whether the federal constitutional requirement that state criminal defendants must be proved guilty beyond a reasonable doubt as a prerequisite to conviction requires that a due process claim of insufficient evidence in the state trial should be upheld, in federal habeas corpus, if the district court finds that the evidence cannot reasonably be said to support the verdict; or whether the present test, under which the petition may be granted only if the verdict is 'totally devoid of evidentiary support,' should be upheld."

This Court's decision in Jackson v. Virginia, supra, essentially resolved the above question in favor of the petitioner, but respondent now contends that it should not be applied in petitioner's case, because when the Sixth Circuit denied petitioner any relief, it "properly applied existing federal habeas corpus standards for reviewing the sufficiency of the evidence." (Respondent's Argument for Denying Certiorari, page 4.)

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTUION

AMENDMENT 5.

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.-No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

AMENDMENT 14.

Citizenship-Due process of law-Equal protection.-All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit

judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

. . .

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

. . .

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination; is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise

appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

V.

STATEMENT OF THE CASE

Johnny L. Blake is incarcerated in the Tennessee State Penitentiary pursuant to a judgment of the Criminal Court of Shelby County, Tennessee, Division II, Honorable Arthur C. Faguin, Jr., presiding, entered on March 21, 1974, sentencing Johnny L. Blake to incarceration in the State Penitentiary for a period of ninety-nine (99) years. That judgment was entered as a result of Mr. Blake's trial and conviction of first degree murder, after his plea of not guilty to an indictment returned by the Shelby County Grand Jury on July 3, 1973.

This was Johnny L. Blake's second trial; his first trial had resulted in a hung jury. Among the Assignments of Error in Mr. Blake's Motion for New Trial before Judge Faquin was an assignment alleging insufficiency of the evidence. On denial of his Motion for New Trial, Mr. Blake made the same contention as one of his Assignments of Error to the Tennessee Court of Appeals. The judgment was affirmed on appeal, and Mr. Blake then petitioned the Tennessee Supreme Court for certiorari. Inexplicably, the question of sufficiency of the evidence did not appear among the Assignments of Error in the Petition for Certiorari. Certiorari was denied by the Tennessee Supreme Court without comment on the question of sufficiency of the evidence.

On December 19, 1977, Mr. Blake petitioned the United

States District Court for the Western District of Tennessee, Western Division, Judge Harry W. Wellford presiding, for habeas corpus, on the grounds that the evidence adduced at the State trial was so slight that his continued incarceration pursuant to his conviction at that trial constitutes a denial of due process. (Appendix to Petitioner's Brief before the Sixth Circuit Court of Appeal, hereinafter referred to as "A") (A3-8). Such ground for habeas corpus relief is specifically sanctioned by the portions of 28 U.S.C. §2254 set out in Part IV, hereinabove.

A Motion to Dismiss was filed on behalf of the State of Tennessee, which relied upon Wainwright v. Sykes, 97 S. Ct. 2497 (1977), for the proposition that Mr. Blake failed to exhaust his state remedies. It was further contended, in the State's Motion, that the transcript of the state trial proceeding alone is sufficient to establish, as a matter of law, that Mr. Blake's conviction was not "totally devoid of evidentiary support." Therefore, the State argued, the Petition should be dismissed for failure to present a federal question.

Although the State expressly couched its procedural ground for dismissal of the Petition in terms of exhaustion requirement of 28 U.S.C §2254, it was admitted in the State's Memorandum that Mr. Blake had no remedy at State law at the time that the Petition was filed, and it is evident in the light of the State's reliance upon Wainwright, supra, that the true contention of the State was not that Mr. Blake had failed to exhaust his State remedies, but rather, that in the course of his State Appeal he had waived his right to assert the insufficiency of the evidence against him and therefore, in keeping with Wainwright, the United States District Court must hold him to that waiver and refuse to hear the claim. (A12-13) In this connection the State admitted that under the waiver test articulated in Fay v. Noia, 372 US 391, 83 S. Ct. 822 (1963), no waiver would be found, not only because there was no evidence that Mr. Blake "knowingly and intelligently chose not to ask the Supreme Court of Tennessee to consider his attack on the sufficiency of the evidence," but also, because the State would be "unable to offer any purported reasons why Mr. Blake may have abandoned this ground in the Supreme Court of Tennessee, either for tactical reasons or for any other purpose." (A 14-15) Nevertheless, the State argued, waiver must be found in light of the more recent decision in Wainwright, supra, "Whereby federal habeas review would be barred absent a showing by applicant of 'cause" for his State procedural default and a further showing of prejudice thereby." (A 15)

Mr. Blake's Memorandum in reply argued that the import of the Wainwright opinion and concurring opinions was that the new test would replace the Fay test only as to trial and pre-trial state procedural defaults, so that wherever, as in the instant case, the State's defense to the Petition is based upon a failure to conform to the rules of State post-trial procedure, the old Fay test would govern. Further, it was contended on behalf of Mr. Blake that although his conviction may not have been totally devoid of evidentiary support, still, the evidence adduced against him was so scant and self-contradictory as to raise a due process issue nevertheless. (A35-45)

On May 22, 1978, Judge Wellford filed a Memorandum Opinion, wherein he held that the cause-prejudice test of Wainwright would be applied to the instant case, and further, that Mr. Blake's Petition would be denied unless he could demonstrate that "there was no relevant evidence whatever to support the jury's finding of guilt." Mr. Blake was given thirty (30) days to show first, that he was entitled to be heard under the new Wainwright test, and second, that his

conviction was supported by "no relevant evidence whatever." (A46-50)

Mr. Blake was unable to respond to these requirements, and therefore, on July 13, 1978, Judge Wellford dismissed the cause. (A 51) Mr. Blake entered his notice of appeal, and Judge Wellford certified that there was probable cause for the appeal. (A52-54)

On February 9, 1979, by its Order appended hereto, the Sixth Circuit Court of Appeals affirmed Judge Wellford's dismissal of Mr. Blake's Petition for Habeas Corpus.

The instant Petition for Certiorari was filed on May 9, 1979, in this Court.

On June 28, 1979, this Court handed down its opinion in Jackson v. Virginia, supra, holding for the first time that a state prisoner's claim that he was convicted on insufficient evidence to support a finding of guilt beyond a reasonable doubt was cognizable in federal habeas corpus.

On July 12, 1979, the respondent filed an argument for the denial of the instant Petition for Certiorari, to which reply is here made.

VI.

REPLY TO RESPONDENT'S ARGUMENT FOR DENIAL OF CERTIORARI

A. DECISION IN JACKSON v. VIRGINIA MUST BE APPLIED TO ALL PENDING AS WELL AS FUTURE FEDERAL HABEAS CORPUS PETITIONS.

1. The State's approach to retroactivity of rulings of this Court expanding the scope of federal habeas corpus, which would afford the benefit of those rulings to habeas petitions not yet filed, while applying the prior rule to those already under review, has no basis in precedent.

In Carafas v. LaVallee (1968), 391 U.S. 234, 88 S. Ct. 1556, this Court addressed the applicability of Nowakowski v. Maroney (1967), 386 U.S. 542, 87 S. Ct. 1197, 18 L.Ed.2d 282, increasing the availability of federal habeas corpus to indigent

prisoners, to the cases of habeas petitioners who had just petitioned this Court for certiorari after their petitions had been denied by courts of appeal under the prior rule. The holding was as follows:

> "In Nowakowski, we held that 'when a district judge grants * * * a certificate [of probable cause], the court of appeals must grant an appeal in forma pauperis (assuming the requisite showing of poverty), and proceed to a disposition of the appeal in accord with its ordinary procedure.' At 543, 87 S. Ct., at 1199. Although Nowakowski was decided after the Court of Appeals dismissed petitioner's appeal, its holding applies to a habeas corpus proceeding which, like this one, was not concluded at the time Nowakowski was decided. Cf. Eskridge v. Washington Prison Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958); see also Linkletter v. Walker, 381 U.S. 618, 628, n. 13, and 639, n. 20, 85 S.Ct. 1731, 1737, 1743, 14 L.Ed.2d 601 (1965); Tehan v. United States ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966)."

Petitioner has found no case wherein this Court has denied a habeas corpus petitioner, before this Court on a Petition for Certiorari, the benefit of a change in a constitutional rule of criminal procedure solely because the Court of Appeal had correctly applied the prior rule in denying him any relief.

The position taken by the respondent, which would result in discrimination against certain habeas corpus petitioners solely because they had not slept on their rights, but caused their constitutional claims to be adjudicated in a lower federal court under an existing rule, prior to the promulgation by this Court of a more liberal rule, is conceptually at odds with the entire line of decisions of this Court, beginning with Linkletter v. Walker (1965), 381 U.S. 618, 85 S.Ct. 1731, concerning the retroactivity of real or apparent changes in constitutional restrictions on criminal procedure or in the scope of habeas corpus relief itself.

Prior to Linkletter, supra, this Court had applied its new rulings to every case coming before it, without discussion of the possibility that there might be policy reasons for giving

some rules prospective effect only. Linkletter v. Walker, 381 U.S., at 628. In Linkletter, this Court addressed a state habeas corpus petitioner's contention under Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), which had held that evidence seized in violation of the Fourth Amendment would not support a state criminal conviction, that his own conviction should be set aside, even though already "final" when the decision in Mapp was handed down. The Court explained what it meant by a "final" conviction:

> "By 'final' we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for Petition for Certiorari had elapsed before our decision in Mapp v. Ohio."
>
> 381 U.S., at 622, n. 5

Petitioner Linkletter argued that because this Court had in the past always applied current law in habeas cases, it was established that new constitutional rules of criminal procedure are always fully retroactive. The Court responded:

> "However, we believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the federal Constitution has no voice upon the subject.'"
>
> 381 U.S., at 629.

The Court reviewed the following alternatives: pure prospectivity, where the rule articulated would apply only to future trials, excluding even the case in which the rule was announced, 381 U.S., at 622; prospectivity, where the rule would apply in future trials as well as in the case in which it was announced, 381 U.S., at 628; "limited retroaction", where the rule would apply prospectively as well as to all cases then on direct review, 381 U.S. at 625-626; and full retroactivity, where the rule would apply to all cases, even collateral attacks on "final" convictions.

The Court observed that since the Mapp rule had already been applied to the case in which it was announced and also

to all cases on direct review at that time, "We are concerned only with whether the exclusionary principle enunciated in Mapp applies to state court convictions which had become final before rendition of our opinion." 381 U.S., at 622.

Linkletter, supra, thus established the conceptual framework for all subsequent decisions of this Court dealing with the retroactivity of newly announced constitutional requirements in the area of criminal procedure. See, for example, Tehan v. United States ex rel. Schott, 382 U.S. 406, 409, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966); Johnson v.State of New Jersey, 384 U.S. 719, 726, 732, 734, 86 S.Ct. 1722 (1966); Desist v. United States, 394 U.S. 244, 252-254. A distinction between habeas corpus petitioners, all of whose convictions are of course "final," which would apply a new constitutional rule of criminal procedure only to those petitions not yet reviewed by a lower federal court under the prior rule, has never been adopted in an opinion of this Court. Here, as in Linkletter, supra, and its progeny, the question is whether the new rule ought to be limited in application only to the case in which it is announced and to future trials, or, be applied retroactively to convictions already "final," even though the trial was conducted properly under the rule then prevailing. (Since petitioner Blake is before this Court on a collateral attack, no question of "limited retroaction" is presented.) It is appropriate to note, at this point, that Jackson v. Virginia, supra, was a habeas corpus case; Jackson's conviction was itself final. This fact alone, petitioner submits, should be dispositive of the question: See this Court's discussion of Gideon v. Wainwright and Jackson v. Denno in Linkletter, supra, 381 U.S. at 628, note 13. See also Johnson v.State of New Jersey, supra, 348 U.S., at 727-728.

2. The holding in Jackson v. Virginia meets the traditional criteria for retroactivity of newly announced constitutional restraints on criminal procedure.

In fact, as is more fully explained infra, the holding of Jackson v. Virginia is not amenable to treatment as a new constitutional rule of criminal procedure for purposes of retroactivity analysis. Nevertheless, it meets the strict requirements that have been fashioned to test the propriety of retroactive application of constitutional holdings affecting fact finding procedures. In Tehan v. United States ex rel. Schott, supra, this Court addressed the question of whether its holding that a state criminal defendant's federal constitutional right against compulsory self incrimination is violated when the prosecutor comments upon his failure to testify, Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, should be applied in a federal habeas corpus proceeding brought by a state prisoner whose conviction was already final when the opinion in Griffin was handed down. Said the Court:

> "[W]e look to the purposes of the Griffin rule, the reliance placed upon the Twining doctrine [Twining v. State of New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908), holding the Fifth Amendment inapplicable to the states, overruled one year prior to Griffin in Molloy v. Hogan, 378 U.S., at 6, 84 S.Ct., at 1492], and the effect on the administration of justice of a retrospective application of Griffin. See Linkletter v. Walker, 381 U.S., at 636, 85 S.Ct. at 1740."
>
> 382 U.S. 410, 413.

Primarily because "the basic purposes that lie behind the privilege against self incrimination do not relate to protecting the innocent from conviction," 382 U.S., at 415, and because "the Fifth Amendment's privilege against self incrimination is not an adjunct to the ascertainment of truth," 382 U.S., at 416, the Court declined to apply Griffin retroactively, observing that:

> "Any impingement upon those values [protected by Griffin] resulting from a state's application of a variant from the federal standard cannot now be remedied. As we pointed out in Linkletter with respect to the Fourth Amendment rights there in question, 'The ruptured privacy * * * cannot be restored." 381 U.S., at 637, 85 S.Ct. at 1742."*1
>
> 382 U.S., at 416.

In Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772 (1966), this Court reviewed the instances where new constitutional protections in the area of criminal procedure were made retroactive, and observed:

> "In each instance we concluded that retroactive application was justified because the rule affected 'the very integrity of the fact finding process' and averted 'the clear danger of convicting the innocent.' Linkletter v. Walker, 381 U.S., at 639, 85 S.Ct., at 1743; Tehan v. United States ex rel. Schott, 382 U.S., at 416, 86 S.Ct., at 465."
>
> 384 U.S., at 727-728.

A definitive statement of the foregoing doctrines appears in Desist v. United States, 394 U.S. 244, 248-250, 89 S.Ct. 1030 (1969).

The retroactivity of In Re Winship**2 was established by this Court in Ivan V.v. City of New York, 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972), with the following observation:

> "'Where the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justicehas sufficed to require prospective application in the circumstances.' Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388 (1971)."
>
> 407 U.S., at 204.

Accordingly, this Court felt compelled to hold Winship fully retroactive:

> Winship expressly held that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence - thisbedrock 'axiomatic

*1 Of course, it is never too late to release a man incarcerated on insufficient proof.

**2 In Re Winship, 397 U.S. 358, 90 S.Ct. 1058 (1970).

> and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' * * * 'due process commands that no man shall lose his liberty unless the government has borne the burden of * * * convincing the fact finder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'" 397 U.S., at 363-364, 90 S.Ct., at 1072.
>
> 407 U.S., at 204.

The principle of Winship, supra, was held applicable to state felony prosecutions against adults in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508. Mullaney v. Wilbur was then held fully retroactive by this Court in Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977), over a strong argument by the state attempting to distinguish Mullaney, supra, from Winship, supra, because of the greater impact on the administration of criminal justice that would result from finding Mullaney fully retroactive. In so doing, this Court relied on the above-quoted language from Ivan V. 432 U.S., at 242-244.

The argument of the respondent in the present case would be that, given Mullaney, supra, the holding in Jackson v. Virginia, supra, is not so vital to the truth-finding function as to overshadow the "impact on administration of justice" factor. In Jackson v. Virginia, however, this Court, in upholding a claim that a federal constitutional right is violated when the evidence is insufficient to support a conclusion of guilt beyond a reasonable doubt, even though the "reasonable doubt" instruction was given to the jury, observed:

> The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. (Emphasis added.)
>
> 47 L.W., at 4887.

Indeed, this Court's discussion in Jackson v. Virginia of the state's argument, under the authority of Stone v. Powell, 428 U.S. 465, that Jackson's claim should be cognizable only on direct review and not in a habeas corpus proceeding, makes unavoidable the conclusion that, should it be viewed as a new constitutional rule of criminal procedure, the holding in Jackson must nevertheless be fully retroactive.

3. Jackson v. Virginia announces no new constitutional rule of criminal procedure, but merely clarifies In Re Winship and/or extends the scope of federal habeas corpus. Consequently, no issue of retroactivity is presented.

All Jackson v. Virginia stands for, as a practical matter, is that a federal habeas corpus court must hear a petitioner's claim that the evidence adduced at his trial was insufficient to support a finding of guilt beyond a reasonable doubt, and must apply to that claim the same test that has traditionally been applied on direct review in both state and federal courts. 47 U.S. L.W., at 4886. It should be evident that this holding has no effect whatever upon the conduct of law enforcement officers, pretrial or trial procedures, or the scope of review on direct appeal. It is therefore impossible to argue that there was any reliance upon the state of the law prior to Jackson v. Virginia. Petitioner has been able to find no instance where this Court has held nonretroactive a holding which merely extends the scope of federal habeas corpus. Fay v. Noia, supra, for example, was held to raise no issue of retroactivity. Linkletter v. Walker, supra, 381 U.S., at 638.

In fact, since the applicable standard of habeas corpus review was not and indeed could not have been raised at any point during the state proceedings in this case, the instant petition should be regarded as being on "direct review" as to that issue, and therefore, subject to the new rule even if it is not fully retroactive. Carafas v. LaVallee, supra; Hamling v. United States, 418 U.S. 87, at 102, 94 S.Ct. 2887, at 2899-2900, 41 L. Ed.2d 590 (1974).

Actually, Jackson v. Virginia states no new rule at all,

but merely provides clarification of the federal right established In Re Winship, a case decided in 1970, prior to Petitioner Blake's conviction in state court. As this Court said, the question presented in Jackson v. Virginia "goes to the basic nature of the constitutional right recognized in the Winship opinion." 47 U.S. L.W., at 4885. And, in deciding that question, this Court held:

> After Winship, the critial inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.
>
> 47 U.S. L.W., at 4886.

In dismissing the petitioner's claim of constitutionally insufficient evidence to support his state conviction, the courts below relied on Thompson v. City of Louisville, 326 U.S. 199, and its progeny. However, in Jackson v. Virginia, supra, it is clearly established that Thompson fails entirely to address the Winship right, but rather, pertains to a failure of due process through arbitrariness. 47 U.S. L.W., at 4885. In relying on Thompson to dispose of constitutional claims such as that of petitioner herein, the lower federal courts have not truly been hearing and disposing of these claims under a prior rule; they have been refusing to hear such claims entirely. As this Court said in Jackson v. Virginia, "[t]he Court in Thompson explicitly stated that the due process right at issue did not concern a question of evidentiary 'sufficiency,' 362 U.S., at 199." 47 U.S. L.W., at 4885. Indeed, it would appear that, even prior to the publication of Jackson v. Virginia (although subsequent to its consideration of the instant case), the Sixth Circuit has itself waivered in its position that Thompson v. Louisville is appropriate authority for the decision of a Winship claim. Jackson v. Virginia, 47 U.S. L.W., at 4886, n. 7.

4. Should Jackson v. Virginia be held inapplicable to the instant petition on reretroactivity grounds, it would nevertheless apply to a second petition based on the same constitutional claim, should one be filed by petitioner herein.

Such a result would of course be repugnant to interests of efficient judicial administration. Nevertheless, it would seem likely. First, as has been noted hereinabove, the application of Thompson v. Louisville to the petitioner's constitutional claim of insufficiency of evidence for a finding of guilt under the reasonable doubt standard is in reality a refusal to hear that claim on the merits, or, to put it another way, a holding that no federal question was raised. Jackson v. Virginia, however, would constitute a change in the law, probably entitling petitioner to a hearing upon the filing of a new habeas corpus petition raising the same claim. Smith v. Yeager, 393 U.S. 122, 89 S.Ct. 277 (1968); St. Pierre v. Helgemoe, 545 F.2d 130[illegible] (1976); Cialkowski v. Franzen, 545 F.2d 1155 (1976).

B. WAIVER ISSUE IN THIS CASE PRESENTS AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW, AS TO WHICH THERE HAVE BEEN CONFLICTING DECISIONS IN U.S. CIRCUIT COURTS OF APPEAL.

1. The respondent is incorrect in his contention that the circuits have consistently applied the cause-prejudice standard to failures by counsel to raise specific issues on appeal from state convictions.

In the fifth circuit, respondent cites Evans v. Maggio, 557 F.2d 430 (5th Cir. 1977). But, as petitioner has previously noted, Evans was undermined by Spinkellink v. Wainwright, 578 F.2d 582, 592 (5th Circuit 1978), where the 5th Circuit declared that the very question which appeared to have been laid to rest by Evans was one of two "difficult questions on which we need not pass." Subsequently, in Tifford v. Wainwright, 588 F.2d 954, 956 (5th Circuit 1979), the 5th Circuit expressly applied the "deliberate bypass" test to a petitioner's failure to file a trial

transcript with his state appeal, preventing the state appellate courts from ruling on his federal claims.[3] Respondent distinguishes Tifford because the "issues which were alleged to have been deliberately bypassed had been considered by the Florida appellate courts." (Argument for Denying Certiorari, page 7.) But in fact, although "Tifford's constitutional claim was fairly presented to the state courts," (emphasis added), it was not considered. The point made by the 5th Circuit here is merely that since Tifford's codefendant, who also appealed, "had the proceedings transcribed and that transcript was available to the state appellate courts," those courts had access, as a practical matter, to everything they would have needed to consider Tifford's constitutional claim, had they chosen to do so. Under these circumstances, "Tifford's constitutional claim was fairly presented to the state courts, and this is sufficient to comply with the exhaustion requirements of §2254. [Citations omitted.]" That the state appellate courts did not actually consider Tifford's constitutional claims is expressly stated. 588 F.2d, all at 956.

This last quotation from Tifford, supra, brings to light a further weakness in respondent's position. Respondent contends that petitioner's failure to include among his assignments of error at the second level of state appeal a claim of insufficiency of the evidence "amounts to a procedural default on that allegation," citing Tenn. Sup. Ct. R. 15(2), and Waycaster v. State, 566 S.W.2d 846 (Tenn. 1977). Rule 15(2) states, in pertinent part:

> " * * * errors not assigned and supported by brief according to this rule will be treated as waived, but the Court, in its discretion, may notice an error overlooked by counsel."

There has been no contention that the Tennessee Supreme Court did not have a trial transcript before it in Petitioner Blake's case. In light of Rule 15(2), supra, it may then be said, in

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3 Admittedly, Tifford was representing himself; however, it is said that he was an attorney.

accordance with Tifford, supra, that "[Blake's] constitutional claim was fairly presented to the state courts, and this is sufficient to comply with the exhaustion requirements of §2254." 588 F.2d, at 956. Nor is Waycaster v. State, supra, to the contrary. In Waycaster, not only did the defendant expressly waive his constitutional claim at the first level of appeal, but further, "[f]or whatever reason, the legality of the arrest and the admissibility of the pistol simply were not developed as issues in the trial record." Waycaster, therefore, is no authority for the failure of the Tennessee Supreme Court to consider the sufficiency of the evidence in Petitioner Blake's case, although having the trial transcript before it.

2. Respondent's interpretation of n. 12 in Wainwright v. Sykes, which reserves the question of whether the "deliberate bypass" standard for determining waivers of constitutional claims should continue to apply to procedural defaults on appeal in state courts, to the effect that only a complete failure to appeal might still evoke the old test, is unwarranted.

Referring to page 7 of respondent's Argument, it may be seen that respondent emphasizes the phrase "all of his claims" in n. 12 to support this position. This is empty verbalism; a defendant who does not raise any one of his claims, of course, "has surrendered * * * the right to have all of his claims * * * considered * * *." The entire rationale of Wainwright v. Sykes focuses on preservation of the integrity of the fact-finding process in state trial courts. The treatment afforded failure to appeal at all and failure to raise specific issues on appeal are, equally, irrelevant to that concern, hence the inclusion of n. 12.

Note, finally, that in insisting that n. 12 of Wainwright v. Sykes should be limited to the precise facts confronting the Court in Fay v. Noia, respondent evidently has overlooked footnote 3 of Fay v. Noia, from which it appears plainly that Noia's failure to file any appeal was the result of an eminently

intelligent decision, participated in by counsel. (Had he succeeded on appeal, Noia might well have received a death sentence upon his retrial.)

C. EVEN IF CAUSE-PREJUDICE TEST APPLIES, PETITIONER IS ENTITLED TO SHOW ON REMAND THAT THERE IS CAUSE AND PREJUDICE AS TO STATE PROCEDURAL DEFAULT AND THAT JACKSON v. VIRGINIA TEST IS MET.

The opinion of the District Court, although affording petitioner 30 days to demonstrate cause and prejudice as to the state procedural default in question as well as the existance of no relevant evidence whatever to support petitioner's conviction, proceeded to review the state trial transcript and reached the conclusion that "it does not appear that the conviction was devoid of evidentiary support so that it constitutes a violation of petitioner's Fourth Amendment due process rights." (Petition for Certiorari, pages 15-19.) Even absent the District Court's prejudgment of the issue, it would have been futile for petitioner to attempt to show that his conviction was totally devoid of evidentiary support. In light of the subsequent decision of this Court in Jackson v. Virginia, however, this is no longer the case. Under these circumstances, in the event that the "cause and prejudice" test of waiver is determined to apply, petitioner must be afforded the opportunity to prove "cause" and "prejudice" so that the merits will be reached under the standard enunciated in Jackson v. Virginia, supra. Smith v. Yeager, supra, 393 U.S., at 125-126, 89 Sup. Ct., at 279-280.

D. ISSUE RAISED BY RESPONDENT UNDER RULES 9(b) AND 2(c) OF THE RULES GOVERNING §2254 CASES IN THE UNITED STATES DISTRICT COURT HAVE BEEN WAIVED.

The invocation of these provisions by the respondent is in the nature of an affirmative defense, which respondent bore the burden of pleading and proving at the District Court level. Sanders v. United States, 373 U.S. 1, 17-18 (1963). The respondent made no pleading of abuse of the writ before the District Court, and consequently, petitioner was afforded no opportunity to respond to same. Petitioner submits that the ruling by the District Court on the merits pretermitted this issue.

E. STANDARD ENUNCIATED IN JACKSON v. VIRGINIA FOR REVIEW OF CONSTITUTIONAL CLAIM OF INSUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION NOT SATISFIED BY MERE REFERENCE TO SYNOPSIS OF FACTS IN OPINION OF ANOTHER COURT.

In a footnote appearing on page 8 of his brief, respondent suggests that the test articulated in Jackson v. Virginia, supra, may be applied by reference to a summary of evidence contained in a 6th Circuit opinion dismissing a prior habeas corpus petition filed by Petitioner Blake, where, in fact, the issue of sufficiency of the evidence was not even presented. This summary is misleading and incomplete, overlooking as it does clear inconsistencies in the state's proof. Should the merits be reached, petitioner would be entitled to an evidentiary hearing, or, at the very least, a judgment on the written record. 47 U.S. L.W., at 4887. This Court reviewed the trial record in Jackson's case; Petitioner Blake should be entitled to no less. 47 U.S. L.W., at 4888.

CONCLUSION

Respondent has offered no cogent argument for the denial of the Writ.

Respectfully submitted,

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